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DIVORCE LEGISLATION NEEDED.

ONLY a small percentage of lawyers are called upon to practice in the divorce courts, or even desire to handle divorce cases, yet the profession as a whole has always shown a deep interest in legislation on the subject. Then, too, lawyers are to a great extent charged with the making of laws as well as with their interpretation and enforcement.

The law and procedure in procuring a divorce present little difficulty to the lawyers, while divorce as a social problem, in an advanced state of civilization, such as that of the United States, offers a problem which is worthy of anyone's best thought, and is attracting the interest of all forward looking men.

It is the purpose of his paper to draw attention to the evil, even though it is beyond the power of anyone to suggest an efficient palliative, and also to suggest some reforms, although we submit that the remedy is one of social psychology founded in and aided by law. Nearly all, if not all, admit the remedy is needed.

That there is no obvious remedy is shown by the fact that various States, since the very beginning of civilization, conscious of the need of divorce laws for the safety of the State, have struggled with the question only to bring about as many varieties of laws as there have been States.

In the United States at one time there were as many as forty-two grounds for absolute divorce and thirty-two grounds for partial divorce.

In 1847 Nisbet, J., of the Georgia Court, in the course of an opinion discussing the general question of divorce, said:

> "Two hundred and ninety-one persons were divorced in Georgia from 1798 to 1835, a period of thirty-seven years, averaging from 1800 to 1810, four *per annum;* from 1810 to 1820, eight; from 1820 to 1830, eighteen; and from 1830 to 1835, twenty-eight. How fearful was the ratio of increase! Well might the patriot, the Christian, and the moralist, look about him for some device to stay this swelling tide of demoralization. The facts stated prove one of two things incontestably, either that I am right and divorces were granted for any and all causes, or society in Georgia was deplorably rude and licentious. The latter cannot be, for take the mass of the population of the two States, and society in Georgia, during that period, was as refined and as moral as in South Carolina, where, to her unfading honor, a divorce has not been granted since the revolution. To remedy a state of things so discreditable to the State, and so alarming to the security of every social interest, the amendment of 1835, I think, was passed. But it is said that the new mode of granting divorces has not remedied the evil; that divorces are as frequent under the new as under the old Constitution." [1]

What would this Judge have said of Virginia, which showed 18,634 persons divorced in the three years 1918-1920, or 4,708 in 1918, 6,556 in 1919, and 7,280 in 1920, or at the rate of 3.20 per one thousand persons.

With such figures before us, it is unnecessary to consider whether or not the evil exists. The important consideration is, can public opinion, on which laws and reforms depend, catch up with the ever increasing growth of this evil. It is discouraging to any hope of reform when it is remembered that for years attention has been called to the rapid growth of divorce, and the number of divorces has proceeded at an ever quickening pace, while little advance has been made towards the adoption of a remedy, much less the application.

The same situation obtains as did with Rome, according to Gibbon, who says:

> "Insufficient remedies followed with distant and tardy steps the rapid progress of the evil."

[1] Head *v.* Head, 2 Kelly 191.

History affords no solution of the problem. The tendency all along has been to increase the grounds on which divorce could be granted.

Plutarch says Romulus allowed only three grounds of divorce—"poisoning, adultery and false keys", and no divorces were known in the early years of the Empire, but as of A. D. 533-565, Gibbon says:

> "When the Roman matrons became the equal and voluntary companions of their lords, a new jurisprudence was introduced, that marriage, like other partnerships, might be dissolved by the abdication of one of the associates. In three centuries of prosperity and corruption the principle was enlarged to frequent practice and pernicious abuse. Passion, interest or caprice suggested daily motives for the dissolution of marriage; a word, a sign, a message, a letter, the mandate of a freedman, declared the separation, the most tender of human connections was degraded to a transient society of profit and pleasure.
> "A specious theory is confuted by this free and perfect experiment, which demonstrates that the liberty of divorce does not contribute to happiness and virtue."

The same tendency has existed for years in this country, for while in early times acts of legislature were required for divorce, in later years the courts were granted the jurisdiction of divorce, with ever increasing grounds and facilities.

The only exception is South Carolina. Of South Carolina and her law, Bishop in his great work on this subject has this to say:

> "This long continuance of a legal rule, contrary to the opinions and practice of all the other States, and even of the Country whence our laws are derived, plainly has worked satisfactorily to the majority of the people, or they would have compelled a change. And it has received praise from abroad; as in the Georgia Supreme Court it was pronounced to be 'to her unfading honor'. The cases are numerous in which her own courts have praised it; for example,—'The policy of this State has ever been against divorces. *It is one of her boasts* that no divorce has ever been granted in South Carolina.' Yet there is no pretence that in this State there have been no breaches of the marriage obligations. Thus said O'Neall, J.: 'The most dis-

> tressing cases, justifying divorce even upon scriptural grounds, have been again and again presented to the legislature, and they have uniformly refused to annul the marriage tie. They have nobly adhered to the injunction, 'Those whom God has joined together let not man put asunder.' The working of this stern policy (of 'nobly' refusing redress, even in the 'most distressing cases', where 'Scripture' joins with reason in crying for it) has been to the good of the people and the State in every respect." [2]

Chancellor Kent said:

> "It is very questionable whether the facility with which divorce can be procured in some of the States be not productive of more evil than good. It is doubtful whether even divorces for adultery do not lead to much fraud and corruption." [3]

The late John B. Minor, whose judgment on this question is entitled to the greatest respect, said on the subject:

> "Religion, reason and experience combine to enforce the sanctity of the marriage tie. If not held to be indissoluble altogether, it is at all events fitting, in the interests of society and of the true happiness of mankind that it should be dissolved only in rare and extreme cases. And whilst a separation by means of a divorce *a mensa et toro,* which it may be hoped will be temporary only, is less to be deprecated, yet even that ought to be limited to cases where it is improper or impossible for the parties to live together." [4]

If divorces were limited to the rich of fashion, whose doings in the divorce courts make headlines for the daily press, there might be less cause for concern, but when some counties of this State which knew no divorces twenty years ago now find the courts clogged with divorces among its laboring and poorer people, it is time for a new appeal to be made.

Certainly those who set the fashion should lead in the reform, but can anything be expected from that source? Apparently not. It but sets the fashion in other ways to break down the ties of home.

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[2] BISHOP, MARRIAGE, DIVORCE AND SEPARATION, vol. 1, § 58.

[3] KENT'S COMMENTARIES, 106.

[4] 1 MINOR'S INSTITUTES (4th ed.), 279.

A recent anonymous writer, styling himself "A Gentlemen with a Duster", says:

> "Youth enters by the gate of comedy and goes out through the door of tragedy. The embrace of the Jazz is dissolved by the decree absolute of the divorce court.
>
> "This is the example set by Fashion in a matter which is foundational to the safety and happiness of the State.
>
> "Civilizations, let us assure ourselves, are far more vulnerable on their domestic side than on their economic side. The home is the unit of the Nation. Family life is the great assurance. If a State would not perish it must see that its homes are the altars of human happiness of the family. A bad example in this matter is a thousand times more perilous than any propaganda of Bolshevism. No gospel of anarchy, indeed, could exist for nine days in a state founded on the sure satisfaction of family life. It is only by the door of domestic unhappiness that political unrest enters a community."

All testimony on this subject is to the same effect, all recognize in the integrity and sanctity of the home, the safety of the State, but few agree on the remedy for the divorce evil. One will favor strict, if not prohibitive laws against divorce, while another will insist that divorce should be easy or else immorality will result. Again, many look to Christianity for the solution of the question, while others go on in the merry whirl with a sneer of "what are you going to do about it?" Well may we turn to Christianity, since all other agencies have failed, but is there no partial remedy that can be applied pending that far off time when a great Nation, having its fundamentals from Christian principles, may become a Nation of Christians?

A well known student of social questions points out that the parental instincts, involving self-sacrifice and suppression of egoistic tendencies on behalf of children are a necessary con dition to the continuance of any society, whether small or large, and that among all peoples, save those low in the scale of culture, "the institution of marriage and the duties of parenthood are surrounded by the most solemn social sanctions, which are embodied in traditional public opinion and in custom, in formal laws, and in rites and doctrines of religion." The same authority also says: "The use of reason and intelligent foresight

modifies profoundly the operation of all the instincts, and is especially apt to modify and work against the play of the reproductive and parental instincts * * * For those societies in which no such sanctions became organized must have died out, while only those in which, as intelligence became more powerful, these sanctions became more formidable, have in the long run survived and reached any considerable level of civilization. There has been, we may say, a never ceasing race between the development of individual intelligence and the increasing power of these social sanctions; and wherever the former has got ahead of the latter, their social disaster and destruction have ensued." [5]

A weakening of such sanctions played a great part, according to this writer, in the destruction of the most brilliant and powerful nations of the past, notably those of ancient Greece and Rome.

The sanctions of marriage in this country, nominally, are all that could be wished, but often these sanctions stop at the altar, and play little part in blocking the way to the divorce court.

The first question to be answered is, can conditions be remedied by law, and the second is, if by law, what is to be the character of the law?

Many answer or put aside the first question with the statement that it is purely a moral question and people cannot have their morals improved by legislation, but with the present tendency in divorces, it is hopeless to look for a cure unless the law steps in to retard, if it cannot prevent the rapid progress of the evil. The law may not be the best way out of this difficult question, but until some evidence of reform along other lines, it is the intermediate if not the only resort. If we have wise laws we may be able to adopt St. Paul's words: "The law hath been our tutor". The law may not be the complete remedy we desire, but it may prepare the way for progress along better and more permanent lines. Certainly from time immemorial nations have looked to the law as a forerunner of better things, and we are too far from anything like a Millenium to hope by moral law to keep evil forces tightly in check. Of

[5] WILLIAM MCDOUGALL, SOCIAL PSYCHOLOGY, 269.

course, there are many who are held to observation of marital duties today by even such laws as we have, but many of those who now seek divorces might be added to this class by wise laws.

We have said that this is a question of social psychology, and so it is in the psychological effect of strict divorce laws, in two ways: by preventing hasty marriages and hasty divorces. If those about to enter matrimony are impressed with the fact that it is for life and is for better or for worse, then the contracting parties will hesitate to enter upon an indissoluble union and will not treat it as a mere try-out. Then, when once entered upon, it will be with a mind that it cannot be dissolved, and what now become grounds for divorce would be the occasion of renewed evidences of esteem. Our Latin books used to contain the sentence: *"Irae amantium redintegratio amoris est,"* but they would now have some such sentence meaning that the quarrels of lovers is the beginning of the divorce action. The idea is fully supported by the following from an opinion of Sir William Scott, later Lord Stowell, in 1790:

> "The humanity of the court has been loudly and repeatedly invoked. Humanity is the second virtue of courts, but undoubtedly the first is justice. If it were a question of humanity simply, and of humanity which confined its views merely to the happiness of the present parties, it would be a question easily decided upon first impressions. Everybody must feel a wish to sever those who wish to live separate from each other, who cannot live together with any degree of harmony, and consequently with any degree of happiness; but my situation does not allow me to indulge the feelings, much less the *first* feelings of an individual. The law has said that married persons shall not be *legally* separated upon the mere disinclination of one or both to cohabit together. The disinclination must be founded upon reasons, which the law approves, and it is my duty to see whether those reasons exist in the present case.
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> "To vindicate the policy of the law is no necessary part of the office of a judge; but if it were, it would not be difficult to show that the law in this respect has acted with its usual wisdom and humanity, with the true wisdom, and that real humanity, that regards the general interests of mankind. For though in particular cases, the repugnance

of the law to dissolve the obligations of matrimonial cohabitation, may operate with great severity upon individuals; yet it must be carefully remembered, that the general happiness of the married life is secured by its indissolubility. When people understand that they *must* live together, except for a very few reasons known to the law, they learn to soften by mutual accommodation that yoke which they know they cannot shake off; they become good husbands, and good wives, from the necessity of remaining husbands and wives; for necessity is a powerful master in teaching the duties which it imposes. If it were once understood, that upon mutual disgust married persons might be legally separated, many couples, who now pass through the world with mutual comfort, with attention to their common offspring and to the moral order of civil society, might have been at this moment living in a state of mutual unkindness—in a state of estrangement from their common offspring—and in a state of the most licentious and unreserved immorality. In this case, as in many others, the happiness of some individuals must be sacrificed to the greater and more general good." [6]

Admitting that some legislation is necessary, it is important to consider what remedial legislation is desirable and feasible.

It is readily conceded that the law should be uniform, and the Standing Committee on Marriage and Divorce of the State Boards of Commissioners for promoting uniformity of legislation in the United States something over twenty years ago recommended a uniform divorce law.[7] This law would prohibit a divorce for any cause arising prior to the residence of either party which was not a ground for divorce in the State where the cause arose, and likewise, at least one year's residence before bringing suit for divorce, such residence to be with the *bona fide* intention of making a permanent home in the State; but where the cause arose without the boundaries of the forum State, the residence must be at least two years before the suit is brought. This law also provides for personal service within or without the State, or an appearance in the case, and that no divorce should be granted solely upon default or upon admission of the pleadings and except upon a hearing before the court in open session.

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[6] Evans *v.* Evans, 4 Eng. Ecc. Rep. 310.

[7] Harvard Law Review, 1900-01, p. 525.

In its report the Committee said:

> "The act proposed attacks directly, and, we believe, effectively three of the greatest evils, considered from a legal standpoint, of the present condition of our various and conflicting laws. First, it does away largely with the scandal of migratory divorces. Second, it prevents the wrong of speedy decrees against absent defendants, who may be ignorant of any suit pending. Third, it does away with the interstate confusion arising from some few States forbidding remarriage, while a great majority of the States permit it."

The Act was designed to prevent a person from securing a divorce for a cause not a ground in the State where the cause arose, and by requiring evidence to be taken in open court to minimize the introduction of false evidence.

This Act, as proposed, has to do with procedure, and such an Act is well calculated to keep persons from moving to another State merely for the purpose of securing a divorce. It does not relate to the cause for divorce, and unquestionably the great difference of opinion as to what causes should be grounds for divorce make it difficult to arrive at an uniform law on the causes.

The failure of the States to adopt even this uniform law for procedure in divorce cases may be responsible for the bill now being pressed in Congress for an amendment to the Constitution of the United States permitting a federal statute on the subject. It is proposed that the federal law shall not affect any State laws which have fewer grounds for divorce than allowed by Congress. Thus the federal law would not make divorce possible in South Carolina.

However sound the reasons for prohibiting divorce may be, it must be conceded that the only hope for reform at this time is in the passage of stricter laws in the hope that the evil may be checked and its further progress blocked.

At the very outset, of course, we will be met by the contention that the indissoluble marriage leads to wrongs sometimes worse than all the evils attendant upon divorce. It is impossible in this paper to analyze in detail the crimes, wrongs and misery that may possibly result from a man and a woman having

to remain married when once the relation has been entered into inadvisedly, but the number affected and the actual suffering of them certainly cannot be as serious as the wrong to society which results from permitting laws to stand which in effect allow marriage to be dissolved almost at will and by mutual consent, because the latter method, in the end, must bring society to such a state that it will be immaterial whether there are any limitations on divorce or not. On the other hand, as pointed out above, it is certain that the very fact of its indissolubility will make marriage more sacred and make for better mating than would obtain where the effect of the law is to permit its dissolution at will or by mutual consent.

Chancellor Kent, speaking of the Romans permitting the liberty of divorce to an injurious degree, said: "This facility of separation tended to destroy all mutual confidence and to inflame every trifling dispute". It is far from unbelievable, under the present lax laws, that many enter the marriage relation as an experiment and certainly without any real conception of its sanctity and permanency. The very idea should be abhorrent, and the only cure for the lack of respect for this, the most sacred of institutions, is to make it indissoluble.

Instead of the law being strict, in many States it has made divorce available almost at will, for witness the law in Virginia for divorce from bed and board; its provisions on the subject being:

> "A divorce from bed and board may be decreed for cruelty, reasonable apprehension of bodily hurt, abandonment or desertion."

and a further provision is made:

> "When three years shall have elapsed after the entering of a decree for divorce from bed and board upon any other ground than that of desertion, and in any case where desertion is a ground for divorce, when three years shall have elapsed from the time of such desertion, upon application of the party injured, * * * the court may merge such a decree for divorce from bed and board into a decree for divorce from the bonds matrimony."

The terms of this section of the Virginia Code, and of any

law which permits divorce on such grounds, are sufficient to condemn it. None of the provisions of this section nor of the provisions of the section permitting divorce from the bonds of matrimony, according to the statistics in Virginia, seem to be important, other than those based on scriptural grounds and desertion, although it may be that the real causes are not frequently stated. Of course, in these days, the apprehension of bodily harm and cruelty are rarely such as to be invoked as grounds for divorce, so that the statistics in Virginia for 1920 show that out of a total of 3,690 divorces, 2,688 were granted for desertion, while 5 were granted for bodily harm and 60 for cruelty, while the City of Alexandria for 1920 shows that out of 431 divorces granted, 388 were for desertion and none were for bodily harm or cruelty. From this it appears that desertion as a ground for divorce is the one most often resorted to. If our contention is correct, if this ground were eliminated, there would be fewer desertions and fewer unhappy marriages, because marriage would be taken more seriously and entered into with greater hope and determination for the future.

The fact that desertion for three years gives a right to divorce must in many cases prevent reconciliations that would otherwise take place and on the contrary must actually operate to encourage the desertion ripening into a ground of absolute divorce after three years.

If desertion is a proper ground for divorce at all, it should only be from the bonds of matrimony, and then only after a greater number of years. It would seem that seven would be a reasonable number. Three years seems entirely too short and to have no effect in limiting divorces, because it is hardly more than the time necessary for the ordinary person to find the mind to attempt matrimony a second time.

There is no punishment in divorce except for the innocent party, and some penalty in every case should be put upon the guilty party, and this can only be done as a general proposition by requiring some share in property to be set aside for the wife and children. This leads to the suggestion that in any case for divorce the innocent party should be given the same rights in the property of the guilty party to which such party would be entitled in the property of a deceased husband or wife under the

usual statutes in such cases, and in addition thereto reasonable alimony and costs, and settlements of property on children should likewise be required to be made by the father when he is the guilty party. Of course, such settlement should be based upon some fixed ratio of property.

Another restriction that ought to be made is that in any case where the cause of divorce amounts to a crime under the laws of the State, that the Judge hearing the divorce case should see that all evidence relating to such crime is certified to the prosecuting attorney, with a view of bringing the guilty party to trial.

None of these suggestions are new, nor are they comprehensive, but it is hoped that slight good may be accomplished by adding this testimony to the need of reform at a time when many others are doing likewise.

Many writers refer to the fact that the Roman philosophers, poets and satirists held up to public scorn and indignation the wanton and extreme abuse of the liberty of divorce, and that Horace, especially, commended the value and continuance of the marriage union, all without effect. It remains to be seen whether modern civilization can cope with the evil with greater success.

Few there are who feel that under American institutions the family life is not affected seriously by this great menace, but the almost unanimous opinion is to the contrary, and the belief is warranted that when once the American people awake to the danger of the evil it will be greatly minimized, if not eliminated.

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